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82-617
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PFEIFFER,

Petitioner,

vs.

ESSEX WIRE CORPORATION, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether compensatory damages for pain and suffering are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*

(2) Whether punitive damages are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*

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In The

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FREDERICK PFEIFFER,

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ESSEX WIRE CORPORATION, a Corporation,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Frederick Pfeiffer, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled matter on July 8, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, is reported at 682 F.2d 684 (7th Cir. 1982) and

is reprinted at Appendix A to this Petition. The United States District Court memorandum dated September 23, 1982 is reprinted at Appendix B. A minute order, dated December 1, 1980, is reprinted at Appendix C and an Order of Court, which was entered concurrently with the minute order, is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals was entered July 8, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The remedial scheme of the Age Discrimination in Employment Act of 1967 (hereinafter referred to as ADEA) is set forth in 29 U.S.C. Section 626 (b) and (c) and provides as follows:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in Sections 211 (b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under Section 623 of this title shall be deemed to be a prohibited act under section 215 of the title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title:

Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts to be deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, that the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

29 U.S.C. § 626 (b), (c) (1976 & Supp. II 1978).

STATEMENT OF THE CASE

Petitioner, FREDERICK PFEIFFER, was hired by the Amphenol-Borg Company, predecessor of the Respondent, ESSEX WIRE CORPORATION, on November 4, 1941. Respondent purchased the Amphenol-Borg Company in 1969 and Petitioner remained as an hourly employee in said plant. Petitioner was transferred from an hourly status to a salary status on August 14, 1972 and remained a salaried employee until his termination with the Respondent on October 17, 1975.

At the time of his discharge, Petitioner was 54 years of age with a combined term of employment of almost thirty-five years with the Respondent and its predecessor Amphenol-Borg Company. Respondent replaced Petitioner with a forty-five year old employee.

Petitioner commenced an action against Respondent on April 4, 1977 alleging that his discharge violated ADEA. At trial, upon the merits of the Petitioner's claim, the jury returned separate verdicts against the Respondent. The jury assessed Petitioner's actual and compensatory damages in the amount of $32,259.96 and punitive damages in the amount of $150,000.00. Respondent subsequently filed timely post trial motions for judgment notwithstanding the verdict, or in the alternative, for a new trial.

By Memorandum dated September 23, 1980, attached hereto as Appendix B, the Honorable George N. Leighton, United States District Court Judge, concluded that during the trial he had erred in ruling on the admission of evidence and erred in instructing the jury on the issue of damages recoverable under the ADEA. Accord-

ingly, by Minute Order dated December 1, 1980, attached hereto as Appendix C, and by Order of Court entered concurrently therewith, attached hereto as Appendix D, Judge Leighton denied the motion of Defendant for judgment notwithstanding the verdicts but granted its motion for a new trial.

That in said Order of Court, attached hereto as Appendix D, Judge Leighton, pursuant to authority vested in him by 28 U.S.C. § 1292(b), certified for interlocutory appeal certain questions of law which concern the appropriate standard of recovery under the ADEA, 29 U.S.C. §§ 621 *et seq.* On February 2, 1981, the United States Court of Appeals for the Seventh Circuit granted Plaintiff's Petition for Permission to Appeal under 28 U.S.C. § 1292(b) in order to consider whether punitive damages and compensatory damages for pain and suffering are properly recoverable under the ADEA, 29 U.S.C. §§ 621, *et seq.*

The United States Court of Appeals for the Seventh Circuit concluded that punitive damages and damages for pain and suffering were not available under ADEA. Consequently, it affirmed the District Court's Order granting a new trial and remanded for further proceedings. A copy of the Court of Appeals' Opinion is reprinted at Appendix A.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the remedial provisions of ADEA, specifically whether compensatory damages for pain and suffering and punitive damages are available under the Act. The Court of Appeals held that these damages are not available under ADEA. This decision, if allowed to stand, will deny aggrieved employees of full compensation for all actual injuries sustained as a result of a violation of ADEA. Furthermore, there will be no deterrent to the willful illegal acts of employers. Because these remedies effectuate the purposes of the ADEA, review by this Court is warranted.

1.

The ADEA provides in part that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in sections 211(b), 216 (except for subsection (a) thereof) and 217 of this title *and subsection c of this section*." 29 U.S.C. § 626(b) (emphasis added). Subsection (c) of Section 626 provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such *legal or equitable relief as will effectuate the purposes of this chapter*." 29 U.S.C. § 626(c) (emphasis added).

It is clear from the statutory language contained in Section 7(b) that Congress intended the remedies in Section 7(c) to supplement the remedies available under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979) (sections 211(b), 216 (except subsection (a) thereof) and 217 of FSLA). *See Flynn v. Morgan Guaranty Trust Co. of New York*, 463 F. Supp.

676 (E.D.N.Y 1979). The ADEA expressly provides that courts shall have jurisdiction to grant such "legal or equitable relief as will effectuate the purposes" of ADEA, 29 U.S.C. § 626(b), suggesting that appropriate relief *in addition* to that specifically provided by the statute can be awarded. Furthermore, Section 7(b) provides that relief under the ADEA includes "*without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. § 626(b) (emphasis added). Because the statute states that relief is available "without limitation," these two provisions suggest the statute makes all legal and equitable relief available and lists specific forms of relief only as examples. Thus, the listing of remedies under Section 7(b) is illustrative rather than limiting.

Accordingly, numerous courts have found compensatory damages for pain and suffering to be properly recoverable under the ADEA. *See Kalli v. Great Am. Ins. Co.*, 516 F. Supp. 1273 (D. Minn. 1981); *Wise v. Olan Mills Inc. of Tex.*, 485 F. Supp. 542 (D. Colo. 1980); *Hassan v. Delta Orthopedic Medical Group*, 426 F. Supp. 1063 (E.D. Cal. 1979); *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976). Similarly, courts have found punitive damages to be a proper legal remedy under the ADEA. *See Wise v. Olan Mills Inc. of Tex.*, 485 F. Supp. 542 (D. Colo. 1980); *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008 (D. Colo. 1980); *Karijolic v. Illinois Bell Telephone Co.*, 19 F.E.P. Cases 447 (N.D. Ill. 1977).

Consequently, in order to enforce the plain meaning of the aforesaid statutory language, punitive damages and compensatory damages should be recoverable under the ADEA.

2.

The Court of Appeals erred in concluding that Congress did not intend ADEA to allow punitive damages or compensatory damages for pain and suffering. In reaching its decision, the Court relied on the following portion of the Congressional Committee Report accompanying the 1978 amendments to ADEA:

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.
>
> The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages *Lorillard v. Pons*, 98 S.Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages" *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942).

House Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 535. The Court believed that this language, when coupled

with the fact that the framers of the amendment could be presumed to have been aware of decisions such as *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 439 U.S. 1022 (1978), which denied punitive damages and compensatory damages for pain and suffering, was highly persuasive, if not dispositive in determining the congressional intent to disallow such damages.

Reliance upon the language contained in the Committee Report cannot withstand close scrutiny. The Report states that ADEA does not provide remedies of a punitive nature and it indicates that liquidated damages, rather than being punitive in nature, are intended to compensate victims of age discrimination from non-pecuniary damages resulting from an employer's willful violation of the Act. Courts, however, have consistently held that the liquidated damages provision of the ADEA is punitive in nature. *Rogers v. Exxon Research & Engineering Co.*, 550 F. 2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Wagner v. Sperry Univac, Div. of Sperry Rand Corp.*, 458 F. Supp. 505, 518 (E.D. Pa. 1978). Furthermore in *Wise v. Olan Mills Inc. of Tex.*, 485 F. Supp. 542 (D. Colo. 1980), the Court specifically rejected the argument that the Conference Committee Report reflects a congressional intent to preclude the recovery of punitive damages under ADEA. The *Wise* Court concluded that "given the Act's unambiguous language and statement of purpose, as well as the fact that the Conference Report focuses on amendments to the Act's jury trial provision, not its remedial provisions, this Court does not consider the Conference Report dispositive." *Id.* at 544. Thus, the Court of Appeals' reliance on the Report does not support a finding of Congressional intent to disallow punitive damages and compensatory damages for pain and suffering.

The unambiguous language in Section 7(b) of the ADEA that there shall be no limitation on the remedial powers of the Court to utilize "such legal and equitable relief as may be appropriate to effectuate the purposes" of ADEA demonstrates that Congress intended a wide range of relief to be made available to eradicate age discrimination in employment. Furthermore, Section 7(c) contains no restrictive language whatsoever on courts' remedial powers to utilize full legal and equitable relief in private ADEA actions. Moreover, Congress expressly stated in Section 7(b) that the FLSA remedies enumerated therein shall be supplemented by the broad relief available under Section 7(c) of the ADEA.

Where the clear statutory language provides a reasonable means to achieve the purpose of the legislation, the plain meaning of the words of the statute should be followed. *Helvering v. City Bank Co.*, 296 U.S. 85, 89 (1935). Moreover, in determining legislative intent, the best evidence thereof is the text of the statute itself. *Patagonia Corp. v. Board of Gov. of Fed. Res. System*, 517 F.2d 803, 813 (9th Cir. 1975).

Because the express language of the ADEA clearly shows that Congress intended a wide range of relief be made available to eradicate age discrimination in employment, the Court of Appeals' conclusion that Congress did not intend punitive or compensatory damages for pain and suffering to be recoverable under the ADEA is unfounded.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-1266

FREDERICK PFEIFFER,

Plaintiff-Appellant,

v.

ESSEX WIRE CORP.,

Defendant-Appellee.

Certified Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 1078—George N. Leighton, *Judge.*

ARGUED JANUARY 20, 1982—DECIDED JULY 8, 1982

Before PELL, *Circuit Judge*, FAIRCHILD, *Senior Circuit Judge*, and GORDON, *District Judge.**

PELL, *Circuit Judge*. This interlocutory appeal, certified under 28 U.S.C. § 1292(b), arises under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (1976 & Supp. II 1978) (ADEA or Act). Following a trial below, the jury awarded the plaintiff actual and compensatory damages of $32,259.56, and punitive damages of $150,000.00. The trial court then determined that it had erred in allowing evidence and giving in-

* Myron L. Gordon of the Eastern District of Wisconsin sitting by designation.

structions on the damages issue, and granted the defendant's motion for a new trial. The court then certified the following questions to this court:

> A. Whether compensatory damages for pain and suffering are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq.
>
> B. Whether punitive damages are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq.

The plaintiff-appellant contends first that the language of the ADEA grants courts the remedial power to impose such damages; second, that the imposition of such damages is consistent with the purpose of the Act as revealed in the legislative history; third, that the availability of liquidated damages does not prohibit recovery of such damages; and fourth, that the administrative conciliation scheme of the Act does not preclude the award of such damages.

I.

The plaintiff, Frederick Pfeiffer, was hired by the defendant's predecessor in 1941. The defendant purchased the company in 1969, and the plaintiff remained as an hourly employee until 1973, when he became a department manager and was transferred to a salaried status. He remained in that status until 1975, when he was discharged. At that time the plaintiff was fifty-four years old. The defendant purportedly replaced the plaintiff with a forty-five year old employee.

Subsequent to his discharge, the defendant remained unemployed for five weeks. During that period he received state unemployment compensation. He then obtained new employment at greater remuneration—both in wages and pension benefits—than he would have received had he remained in the employ of the defendant. In 1977 the plaintiff initiated the instant civil action, alleging that his discharge violated the ADEA.

II.

The plaintiff's first contention is that the express statutory language of the Act grants courts unlimited jurisdiction to award the full panoply of legal and equitable relief, including compensatory damages for pain and suffering and punitive damages. He bases this argument upon the language of the remedial portion of the Act, the text of which is set forth in the margin.[1]

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[1] "(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter. *In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 28 U.S.C. § 626(b) (1976 & Supp. II 1978) (emphasis added).

We also reject the plaintiff's contention that the language of § 626(c) is an independent source of remedies under the statute. That section provides:

> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, that the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(Footnote continued on following page)

We are not persuaded, however, that the quoted language unambiguously authorizes the grant of broad relief sought by the plaintiff. Initially we note that the language of the statute mentions neither damages for pain and suffering nor punitive damages, and that such damages are omitted from the statutory definition of "amounts owing." *Naton v. Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981).

Furthermore, the seemingly broad language must be read in the context of the entire section. *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1038 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978). There are two limitations built into section 626(b). The first is contained in the reference to sections 216 and 217 of the chapter, the Fair Labor Standards Act. 29 U.S.C. §§ 201-19 (1976) (FLSA). The second is the definition of amounts owing as unpaid minimum wages or unpaid overtime compensation. We therefore reject the plaintiff's contention that the statute expressly grants the remedies he seeks to invoke, and turn to a fuller examination of the statutory context, as well as the legislative history and purpose, to determine whether the grant of such broad relief was, indeed, the intention of Congress.

III.

We note preliminarily that five circuits have considered the issues now before us. All have rejected the plaintiff-appellant's position, and held that recovery under the ADEA is limited to unpaid wages and, in the case of willful violation, an additional equal amount as liquidated damages. *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981) (pain and suffering); *Slatin v. Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979) (pain and suffering); *Walker v. Pettit Construction*

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[1] *continued*
Its sole effect is to give individuals the ability to take advantage of the relief conferred in § 626(b), the preceding subsection. *Schlicke v. Allen-Bradley Co.*, 448 F. Supp. 252, 253 (E.D. Wis. 1978).

Co., 605 F.2d 128 (4th Cir. 1979) (punitive); *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Dean v. American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978) (pain and suffering and punitive); *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978) (pain and suffering).

A. The Statutory Context

1. The Effect of Reference to the FLSA

When the ADEA was formulated by Congress, several alternatives were considered. The version ultimately adopted, as proposed by Senator Javits, eschewed various schemes of enforcement in favor of selective adoption of the FLSA enforcement provisions. 113 Cong. Rec. 7076, 31250 (1967); *see Vazquez*, 579 F.2d at 109-10.

The FLSA created a private right of action to recover unpaid minimum wages and an equal amount as liquidated damages. 29 U.S.C. § 216(b) (1976). It also provided criminal penalties for violation. *Id.* § 216(a). No provision was made for compensatory or punitive damages, and courts have universally struck down requests for such damages. *See, e.g., Overnight Transportation Co. v. Missel*, 316 U.S. 572 (1942) (punitive damages); *Martinez v. Behring's Service, Inc.*, 501 F.2d 104, 105 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 930 (pain and suffering). Congress can be presumed to have had the knowledge of the interpretation given the FLSA when it enacted the ADEA, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), and therefore if it intended punitive and pain and suffering damages to be obtainable under the ADEA, that availability must be the result of the selective changes made in the remedial provisions of the FLSA to obtain the final version of the ADEA.

Three pertinent changes were made. First, the ADEA eliminated the criminal penalty of § 216(a) of the FLSA. Second, it limited the availability of liquidated damages, obtainable in any private suit under FLSA, to cases where an ADEA claimant could demonstrate that

the violation was willful. These two changes suggest Congress intended to limit the scope of remedies under the ADEA. The third change, however, was the addition of the expansive language relied on by the plaintiff, which provides for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." We turn, therefore, to the inquiry whether the limitation to FLSA remedies will effectuate the purposes of the ADEA. *See Vazquez*, 597 F.2d at 110-11.

2. The Administrative Conciliation Scheme

Several circuits have followed the lead of the Court of Appeals for the Third Circuit in *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 439 U.S. 1022 (1978), and determined that award of damages beyond unpaid wages and liquidated damages would hamper the administrative conciliation process envisioned by the statute. *Naton*, 649 F.2d at 699; *Slatin*, 590 F.2d at 1296; *Dean*, 559 F.2d at 1038-39. The process of ADEA enforcement requires initial recourse to conciliation by the Department of Labor, subsequent recourse to a private suit if conciliation fails, and termination of that private right if the Secretary of Labor brings suit. 29 U.S.C. §§ 626(b) and (c)(1).

The *Rogers* court noted the deleterious effect availability of damages beyond the FLSA limit would have on such administrative conciliation: that such entitlement without guidelines is a vague and amorphous concept uncommon in administrative actions; that introduction of such an element of uncertainty would impair the conciliation process; that the Act itself does provide an objective test, the amount of lost earnings; and, apparently most significantly, that the possibility of recovering a large verdict will make a claimant less than enthusiastic about accepting a settlement for only out-of-pocket losses, clearly not only jeopardizing the conciliation process but ultimately increasing the volume of litigation in the courts. 550 F.2d at 841. We agree that the introduction of damages for pain and suffering and of punitive damages would be a serious impediment to administrative conciliation, and would thereby thwart

the Congressional intent evidenced by the ADEA remedial scheme.

B. The Legislative History and the 1978 Amendments

Other than by reference to the FLSA as noted above, the legislative history of the passage of the ADEA is not particularly illuminating. In 1978, however, the Act was amended. In the process of endorsing the correctness of the *Lorillard* decision, the Congressional Conference Committee considered the damages provisions of the Act. That report, which represents the "considered and collective understanding of those Congressmen involved in drafting and studying [the] proposed legislation," *Zuber v. Allen*, 396 U.S. 168, 186 (1969), stated:

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.
>
> The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages *Lorillard v. Pons*, 98 S.Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for esti-

mate other than by liquidated damages" *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942).

House Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 535 (footnote omitted). This language, and the fact that the framers of the amendment can be presumed to have been aware of the *Rogers* and *Dean* decisions rejecting punitive and pain and suffering damages, is highly persuasive, if not dispositive, in determining the purpose of Congress to disallow such damages.

Therefore, in light of the language of the Act, the statutory context, and the legislative purpose as expressed in the remedial scheme and legislative history, we find, in accord with the overwhelming weight of authority, that punitive damages and damages for pain and suffering are not available under the ADEA. We find, therefore, that the district court properly concluded that it had erred in instructing the jury and in permitting the admission of evidence on the availability of such damages. The order of the district court granting a new trial is therefore affirmed and the cause is remanded for further proceedings. Because of the somewhat unusual circumstances of this case, Circuit Rule 18 shall not be applicable on remand.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

MEMORANDUM
(Dated September 23, 1980)

This is a suit by a former employee to recover for alleged age discrimination under 29 U.S.C. §§621 *et seq.*, the Age Discrimination in Employment Act of 1967. Trial was had before a jury that returned verdicts assessing plaintiff's actual and compensatory damages in the sum of $32,259.56 and awarding him punitive damages in the sum of $150,000.00. Defendant has moved for judgment notwithstanding the verdicts or in the alternative, for a new trial. After considering the post trial memoranda of the parties, this court denies defendant's motion for judgment notwithstanding the verdict; but grants its alternative motion for new trial.

Before the jury, over defendant's objections, plaintiff was permitted to show that he was entitled to recover from defendant for pain and suffering, actual, compensatory, and punitive damages. When this court instructed the jury, again over defendant's objections, it was told that if it found for the plaintiff, it could compensate him for pain and suffering, and award him actual, compensatory, and punitive damages. During the trial, on memoranda submitted by the parties, the court was persuaded by plaintiff's argument that the controlling case was *Kennedy v. Mountain States Telephone and Telegraph Co.*, 449 F.Supp. 108 (D.C. Col. 1978), where it was held that punitive damages are recoverable in a suit under the Age Discrimination in Employment Act, 29 U.S.C.A. §§621 *et seq.*, 626, 626(c). Having heard such evidence, and being so instructed, the jury found for the plaintiff and returned verdicts that totalled

$183,259.56, even though he remained unemployed for five weeks after defendant discharged him; and he has been working for a company that has paid him more money than he would have earned from defendant.[1]

In post-trial proceedings, being guided by a study of the decisions, this court observes that at least four judges of this court have either held or said in *dicta* that punitive damages are not recoverable under the Age Discrimination in Employment Act. *Bertrand v. Orkin Exterminating Co.*, 454 F.Supp. 78 (N.D. Ill. 1978, *dicta*, Judge Decker); *Stevenson v. J. C. Penney*, 464 F.Supp. 945 (N.D. Ill. 1979, holding, Judge Marovitz); *Brin v. Bigsby and Kruthers*, 19 F.E.P. 415, 78 C 2892 (N.D. Ill. 1979, holding, Judge Bua); *Hansen v. General Telephone Directory Co.*, 176 C 848 (N.D. Ill. 1980, holding from the bench, Judge Marshall).

A reading of the legislative history of the 1978 amendments to the Act makes it clear that Congress did not intend to "provide remedies of a punitive nature" when it enacted the Age Discrimination in Employment Act. *See* U. S. Code Cong. & Admin. News pp. 504, 528, 535. Moreover, all circuit courts of appeal which have

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[1] Plaintiff earned $13,476.00 per year working for defendant. He was discharged on October 17, 1975 and received $672.00 from unemployment compensation for the five weeks he remained unemployed. Then for the balance of the year of 1975, he was paid by his new employer $617.34. In 1976 he earned $13,686.24 from his new employer; and $14,902.49 in 1977. In addition, while working for defendant he accrued $6.50 per month per year on his pension; for his new employer he accrued $16.00 per month per year. From all of these figures, defendant argues that as a matter of law, plaintiff, at most, is entitled to recover for lost wages in an amount equal to five weeks' pay he would have received from defendant, less the unemployment compensation he received which would entitle him to recover $620.77 in this lawsuit.

ruled on the issue agree that damages for pain and suffering are not recoverable under the Act. *Vasquez v. Eastern Airlines*, 578 F.2d 107 (1st Cir. 1978); *Rogers v. Exxon Research Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977); *Slaten v. Stanford Research Institute*, 530 F.2d 1292 (4th Cir. 1979); and *Dean v. American Airlines*, 559 F.2d 1036 (5th Cir. 1977). And district judges in this circuit, who have spoken on the subject, have held that compensatory damages are not recoverable under the Age Discrimination in Employment Act. *See Brin v. Bigsby and Kruthers*, 19 F.E.P. 415, 78 C 289? (N.D. Ill. 1979); *Stevenson v. J. C. Penney*, 464 F.Supp. 945 (N.D. Ill. 1979); *Knerr v. Norge Co.*, 21 F.E.P. 166, 79-2080-B (S.D. Ill. 1979).

Therefore, this court must conclude that in the trial of this action it erred in ruling on admission of evidence; and it erred when it instructed the jury. For these reasons, the verdicts cannot stand. In this simple, uncomplicated case, it cannot be determined to what extent these erroneous rulings and instructions influenced the jury in reaching verdicts that total $182,259.56. Nor can the verdicts be reduced to a point where a legal judgment can be entered. Consequently, there has to be a new trial.

Plaintiff argues that it is important to his rights under the Age Discrimination in Employment Act that there be a determination whether in this circuit a plaintiff can recover punitive damages. He points out that the Supreme Court of the United States has not passed on this question; and in this circuit, the court of appeals has not resolved the issue. Therefore, under the provisions of 28 U.S.C. §1292(b), he asks this court to certify to the court of appeals whether punitive damages can be recovered in this case because the issue "involves a con-

trolling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the [order granting a new trial] may materially advance the ultimate determination of the litigation, . . ." This court agrees with the plaintiff. Accordingly, he, through his counsel, may propose an order, as authorized by 28 U.S.C. §1292(b), which this court will consider and enter certifying questions concerning standard of recovery in an age discrimination in employment case such as this one, including the question whether punitive damages are recoverable under the Act. In the event the court of appeals grants plaintiff an immediate appeal, the proceedings in this court will be stayed to await the reviewing court's mandate. In the event the court of appeals does grant immediate appeal, the new trial will proceed in due course.

So ordered,

/s/ George N. Leighton
United States District Judge

Dated: September 23, 1980

APPENDIX C

ORDER
(Dated December 1, 1980)

Ordered that the motion of the defendant for judgment notwithstanding the verdict is denied and the motion of the defendant for a new trial is granted, without further notice.

Further Ordered, this court certifies to the 7th Circuit questions concerning the standard of recovery under the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 621, *et seq.* DRAFT

/s/ Leighton, J.

APPENDIX D

ORDER
(Dated December 1, 1980)

THIS MATTER coming on to be heard on the post trial motions of the Defendant, ESSEX WIRE CORPORATION, a Corporation, for judgment notwithstanding the verdicts or in the alternative, for a new trial, the Court having considered the post trial memoranda of the parties and having heard the arguments of counsel relative thereto, DOES FIND:

1. That at the trial of the above entitled matter the jury returned separate verdicts against the Defendant and assessed the Plaintiff's actual and compensatory damages in the amount of $32,259.56 and punitive damages in the amount of $150,000.00.

2. That during said trial this Court erred in ruling on the admission of evidence and erred in instructing the jury on the issue of damages recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621, *et seq.*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That the Motion of the Defendant for Judgment notwithstanding the verdict be and hereby is denied and for the reasons hereinabove set forth, the Motion of the Defendant for a new trial be and hereby is granted, without further notice.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED:

1. That pursuant to 28 U.S.C. §1292(b) this Court specifically finds that the issue of damages recoverable under the Age Discrimination in Employment Act of

1967, 29 U.S.C. §§621 *et seq.*, involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order granting a new Trial may materially advance the ultimate termination of the litigation, and therefore, this Court hereby certifies to the Seventh Circuit Court of Appeals the following questions concerning the standard of recovery under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621, *et seq.*:

A. Whether compensatory damages for pain and suffering are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 *et seq.*

B. Whether punitive damages are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§621 *et seq.*

2. That should the Court of Appeals grant the Plaintiff an immediate appeal, the proceedings in the District Court shall be stayed pending a determination of the issues aforesaid by the Court of Appeals.

SO ORDERED,

/s/ George N. Leighton
United States District Judge

Office - Supreme Court, U.S.
FILED
NOV 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PFEIFFER,

Petitioner,

v.

ESSEX WIRE CORPORATION, a Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether, in addition to the relief specifically authorized by the Age Discrimination in Employment Act of 1967 for violation of its provisions, which relief includes unpaid wages plus, in cases of willful violations, liquidated damages doubling that amount, an aggrieved person may also receive either damages for pain and suffering or punitive damages.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-617

FREDERICK PFEIFFER,

Petitioner,

v.

ESSEX WIRE CORPORATION, a Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF IN OPPOSITION TO CERTIORARI

STATUTES INVOLVED

The petition sets forth the text of Section 626(b) and (c) of the Age Discrimination in Employment Act of 1967 ("ADEA" or "Act"), as amended, 29 U.S.C. §§ 621-634. The petition does not, however, set forth Section 621 of the ADEA, which is involved, or Section 216(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), to which specific reference is made in ADEA Section 626(b) and which is also involved. These provisions are set forth in the Statutory Appendix at pages 1a-2a, *infra*.

COUNTERSTATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case, but adds the following:

After being discharged from Essex Wire Corporation ("Essex") on October 17, 1975, Petitioner was unemployed for a period of five weeks, during which time he received unemployment compensation benefits under the Illinois Unemployment Compensation Act. On December 4, 1975, Petitioner began employment with the Nabisco Company in Chicago. In his new position, Petitioner received greater remuneration—both in wages and pension benefits—than he would have received had he remained in Essex's employ. Pet. App. 2a, 10a.[1]

REASONS FOR DENYING THE WRIT

1. There Is No Conflict Among The Courts Of Appeals.

No court of appeals that has been presented with the question of the appropriate relief available to a plaintiff under the Age Discrimination in Employment Act of 1967—and there are now seven—has permitted either damages for pain and suffering or punitive damages.

The Court of Appeals for the Third Circuit in *Rogers* v. *Exxon Engineering & Research Corp.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), was the first court of appeals to address the issue. It held that damages for pain and suffering were not available to a claimant under the Act. It adhered to that decision in *Wehr* v. *Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980).

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[1] The petition will be cited herein as Pet. ____, and the appendix to the petition will be cited as Pet. App. ____.

Shortly after *Rogers*, the Court of Appeals for the Fifth Circuit in *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978), held that neither damages for pain and suffering nor punitive damages could be awarded under the statute. *Accord Murphy* v. *American Motors Sales Corp.*, 570 F.2d 1226 (5th Cir. 1978) (per curiam) (punitive damages are not recoverable).

The Court of Appeals for the Fourth Circuit held in *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979), that there could be no compensation under the statute for pain and suffering, and shortly thereafter, in *Walker* v. *Pettit Construction Co.*, 605 F.2d 128 (4th Cir. 1979), it adhered to this holding and held that punitive damages were not authorized under the statute.

Until the decision below, the question of punitive damages had not again reached a court of appeals, but prior to that decision the question of the availability of damages for pain and suffering had been decided in the negative by the Courts of Appeals for the First, Eighth, and Ninth Circuits. *Vazquez* v. *Eastern Air Lines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Fiedler* v. *Indianhead Truck Line, Inc.*, 670 F.2d 806 (8th Cir. 1982); *Naton* v. *Bank of California*, 649 F.2d 691 (9th Cir. 1981). *See also Cancellier* v. *Federated Department Stores, Inc.*, 672 F.2d 1312 (9th Cir. 1982) (dicta).

The decision below, *Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d 684 (7th Cir. 1982), Pet. App. 1a, thus constitutes the seventh court of appeals decision refusing to read into the statute authority for damages beyond that for lost wages and, in cases of willful violations, an equal amount in liquidated damages. It held that neither damages for pain and suffering nor punitive damages could be awarded.

No court of appeals has held to the contrary, either with respect to damages for pain and suffering or punitive damages. Most of the federal district courts in the circuits that have not spoken on the issue have rejected claims for damages for pain and suffering under the ADEA.[2] Similarly, the district courts in such circuits have, for the most part, rejected claims for punitive damages.[3]

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[2] Since 1978, the following district court cases from those circuits that have not yet addressed the issue have rejected pain-and-suffering damages under the ADEA. Berry v. Gen. Elec. Co., 541 F. Supp. 800 (W.D. Ky. 1982); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57 (S.D.N.Y. 1981); Placos v. Cosmair, Inc., 517 F. Supp. 1287 (S.D.N.Y. 1981); Buchanan v. Gateway Int'l, Inc., 27 Fair Empl. Prac. Cas. (BNA) 1649 (D. Kan. Dec. 3, 1981); Ginsberg v. Burlington Indus., Inc., 500 F. Supp. 696 (S.D.N.Y. 1980); Friend v. Union Dime Savings Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307 (S.D.N.Y. Aug. 18, 1980); Ayres v. Federated Dep't Stores, Inc., 24 Fair Empl. Prac. Cas. (BNA) 528 (S.D.N.Y. Jan. 25, 1980); Douglas v. Am. Cyanamid Co., 472 F. Supp. 298 (D. Conn. 1979); Riddle v. Getty Refinery & Mktg. Co., 460 F. Supp. 678 (N.D. Okla. 1978); Dunwoodie v. Chrysler Co., 459 F. Supp. 971 (E.D. Mich. 1978); Seider v. Canada Dry Corp., 18 Fair Empl. Prac. Cas. (BNA) 1786 (S.D.N.Y. April 11, 1978).

Only four district court cases decided in those circuits since 1978 have permitted pain-and-suffering damages. Wise v. Olan Mills, Inc., 485 F. Supp. 542 (D. Colo. 1980); Pavlo v. Stiefel Labs, Inc., 22 Fair Empl. Prac. Cas. (BNA) 489 (S.D.N.Y. Nov. 20, 1979); Flynn v. Morgan Guar. Trust Co., 463 F. Supp. 676 (E.D.N.Y. 1979); Gifford v. B.D. Diagnostics, 458 F. Supp. 462 (N.D. Ohio 1978).

Additional district court cases cited for this proposition at page 7 of the petition preceded the contrary decisions of the courts of appeals for their circuits.

[3] The following district courts in those circuits that have not yet spoken on the issue have refused to permit punitive damages under the ADEA. Boddorff v. Publicker Indus., Inc., 488 F. Supp. 1107, 1114 (E.D. Pa. 1980); Douglas, 472 F. Supp. at 303-04; Riddle, 460 F.

2. The Decision Below Is Correct.

The ADEA does not purport to authorize damages for pain and suffering or punitive damages. Instead, with certain enumerated exceptions discussed below, Section 626(b) expressly incorporates the enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. *See Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978).[4] That statute created a private right of action to recover unpaid minimum wages and an additional amount as liquidated damages. 29 U.S.C. § 216(b). It also provided for criminal penalties for FLSA violations. 29

Supp. at 679-80; Dunwoodie, 459 F. Supp. at 973; Wagner v. Sperry Univac, 458 F. Supp. 505, 518 (E.D. Pa. 1978), *aff'd mem.*, 624 F.2d 1092 (3d Cir. 1980); Gifford, 458 F. Supp. at 464; Hannon v. Continental Nat'l Bank, 427 F. Supp. 215, 218 (D. Colo. 1977); Looney v. Commercial Union Assurance Co., 428 F. Supp. 533, 536-37 (E.D. Mich. 1977); Fellows v. Medford Corp., 431 F. Supp. 199, 202 (D. Or. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329, 1336-37 (E.D. Pa. 1976).

Only two cases in those circuits have allowed punitive damages. Wise, 485 F. Supp. at 545; Kennedy v. Mountain States Tel. & Tel. Co., 449 F. Supp. 1008 (D. Colo. 1980). In light of the decision below, the case of Karijolic v. Illinois Bell Telephone Co., 19 Fair Empl. Prac. Cas. (BNA) 447 (N.D. Ill. Oct. 26, 1977), cited at page 7 of the petition, is no longer the law in the Northern District of Illinois.

[4] There, this Court noted the close relationship between the FLSA and the ADEA enforcement provisions in holding that since the FLSA provided for a jury trial on the issue of unpaid wages, the ADEA litigant was also entitled to a jury trial on the issue of lost wages. The Court observed:

> This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA. Senator Javits, one of the floor managers of the bill, so indicated

U.S.C. § 216(a). It has no provision for damages for pain and suffering or punitive damages, and this Court has held that punitive damages are not recoverable for violations. *Overnight Transportation Co.* v. *Missel*, 316 U.S. 572, 582-84 (1942). While this Court has not had before it the issue of whether pain-and-suffering damages are recoverable under the FLSA, no court of appeals has permitted such damages. *See Martinez* v. *Behring's Service, Inc.*, 501 F.2d 104, 105 (5th Cir. 1974); *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959); *Bonner* v. *Elizabeth Arden, Inc.*, 177 F.2d 703, 705 (2d Cir. 1949).

Congress was undoubtedly cognizant of the limitations on FLSA remedies recognized by the foregoing cases that had already been decided when it adopted the ADEA in 1967, incorporating the FLSA remedial scheme.[5] For this reason, any claim by Petitioner for pain-and-suffering or

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in describing the enforcement section which became part of the Act: "The enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; in fact, [the ADEA] incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]." 113 CONG. REC. 31254 (1967).

434 U.S. at 582.

[5] As this Court stated in *Lorillard:*

> So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

434 U.S. at 581.

punitive damages must arise from one of the changes made by Congress when it altered the remedial provisions of the FLSA to obtain the final version of the ADEA.

The change urged by Petitioner (Pet. 7) as giving rise to punitive and pain-and-suffering damages in the ADEA is the addition of the catch-all language, following the provisions for lost wages and liquidated damages, appearing in Section 626(b):

> In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.[6]

This language is most sensibly read, however, to ensure that courts have full latitude to tailor the terms and conditions of relief specified by the statute—reinstatement, promotion, employment, or judgments for lost wages and liquidated damages—to the particular facts of a given case. *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036, 1038 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

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[6] The two other changes made by Congress in the remedial provisions of the FLSA when adopting the ADEA were the elimination of the criminal penalty contained in Section 216(a) for willful violations and the limitation of liquidated damages to those cases where plaintiffs can prove a willful violation of the Act. This latter change in effect shifted the burden of proof from defendants to plaintiffs for the purposes of obtaining liquidated damages. *See* 29 U.S.C. § 260.

The purposes of the ADEA, as codified at Section 621(b), are to promote employment, prohibit discrimination, and help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621(b). As found in Section 621(a)(3), Congress was concerned that members of the protected group might be without gainful employment. Precisely because of this concern Congress specifically authorized the courts to order reinstatement, employment, or promotion. The express Congressional remedies—payment of lost wages, doubled when violations are willful, plus court-ordered employment or reinstatement—were presumably believed adequate to address the problem of inability to secure employment. *Rogers* v. *Exxon Engineering & Research Corp.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). As there stated, "Congress might well have believed that the resumption of productive work removes the rest of the emotional anxiety and monetary deprivation which occurred in the interim is restored by an award for the actual loss." *Id.*[7]

Petitioner also relies on Section 626(c) as granting remedies under the Act. As noted by the court below, however, Section 626(c) is no more than a jurisdiction-granting section and is not an independent source of

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[7] It is ironic that Petitioner should claim license for compensatory recovery on the basis of Congress's concern over long-term unemployment since in fact Petitioner found another, better paying job shortly after he left Respondent's employ with the result that he experienced minimal financial loss. The jury verdict herein of $182,259 is precisely the kind of unwarranted recovery that was a legitimate concern of the Third Circuit in *Rogers* and, it may be inferred, that led Congress to limit the scope of relief available under the ADEA.

remedies under the statute. *Pfeiffer*, 682 F.2d at 685 n.1, Pet. App. at 3a-4a; *Schlicke* v. *Allen-Bradley Co.*, 448 F. Supp. 252, 253 (E.D. Wis. 1978). *Cf. Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 577 (1979) (Section 27 of the Securities Exchange Act of 1934 merely grants jurisdiction to federal courts; it creates no cause of action and imposes no liabilities). The parallel provision in the FLSA, which appears in Section 216(b), 29 U.S.C. § 216(b), has not been held to justify this type of relief.

The legislative history of the original ADEA in 1967 does not discuss whether pain-and-suffering or punitive damages are available; as pointed out by the court below, 682 F.2d at 687, Pet. App. 7a-8a, however, the Conference Report with respect to the 1978 amendments[8], which, *inter alia*, specifically authorized a jury trial, shows that Congress assumed that such damages were not available. It stated:

> The ADEA as amended by this act does not provide remedies of a punitive nature.[9]

It also stated that

> liquidated damages . . . compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.[10]

The Conference Report was issued on March 14, 1978, which was subsequent to the Third Circuit's decision in *Rogers* (January 20, 1977) and the Fifth Circuit's decision in *Dean* (October 26, 1977). The Report was also issued

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[8] HOUSE CONF. REP. NO. 950, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528.

[9] *Id.* at 14, 1978 U.S. CODE CONG. & AD. NEWS at 535.

[10] *Id.* at 13, 1978 U.S. CODE CONG. & AD. NEWS at 535.

subsequent to the dates this Court denied petitions for certiorari in those two cases. Since no court of appeals had permitted damages for pain and suffering or punitive damages, it can safely be assumed that the legislators were aware of the *Rogers* and *Dean* cases and tacitly approved of their holdings. *See Lorillard* v. *Pons*, 434 U.S. at 581. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, ___ U.S. ___, 50 U.S.L.W. 4457, 4464 (May 3, 1982) (the fact that the amendment of the Commodity Exchange Act left intact statutory provisions under which federal courts had consistently implied a private right of action provided evidence that Congress intended that private right to survive).

The enforcement scheme contemplated by the ADEA also seriously undermines Petitioner's arguments. Prior to the institution of an action under the ADEA, administrative proceedings must be commenced by the filing of a charge with a representative of the United States Department of Labor so that conciliation may be effected under the auspices of the Department. 29 U.S.C. § 626(b). As pointed out in *Rogers*, 550 F.2d at 841,

> An entitlement to an award for pain and suffering without guidelines of any sort is a vague and amorphous concept traditionally found in a private lawsuit but is uncommon in administrative actions . . . .
>
> While the existence of such an item of damages might strengthen the claimant's bargaining position with the employer, it would also introduce an element of uncertainty which would impair the conciliation process . . . .
>
> The Act provides for determination of the amount of damages by an objective test—the amount of lost earnings. While the exact computation may be the subject of disagreement, that type of dispute is familiar to administrative proceedings and generally not difficult to resolve.

3. The Petition Does Not Present An Important Federal Question For Review By This Court.

The unanimity of the court of appeals decisions addressing the issue raised by Petitioner verifies that no important federal question is here presented. In this regard, it is significant to note that damages for pain and suffering and punitive damages are not available under a number of other federal labor statutes, such as Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (making illegal discrimination on the basis of race, sex, and national origin), and Section 10(c) and (e) of the National Labor Relations Act, 29 U.S.C. § 160(c) and (e) (allowing remedies for unfair labor practices),[11] which provide for various forms of equitable relief, including back pay. Presumably, Congress has not deemed the unavailability of such damages in those statutes as denying full relief to plaintiffs. Similarly, ADEA plaintiffs will not be deprived of relief intended by Congress because of the unavailability of those damages.

In urging that without such damages there will be no deterrent to willful illegal acts by employers in violation of the ADEA (Pet. 6), Petitioner ignores the purpose of the double damages as a liquidated penalty in the case of willful violations. And there is no danger that persons harmed by violations of the Act will be faced with difficulty in retaining counsel because of the lack of damages for pain and suffering and punitive damages, because a prevailing plaintiff under the Act may recover attorney's

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[11] *E.g.*, De Grace v. Rumsfeld, 614 F.2d 796, 808 (1st Cir. 1980) (Title VII); Richerson v. Jones, 551 F.2d 918, 926 (3d Cir. 1977) (Title VII); International Union, U.A., A. & A.I.W. v. Russell, 356 U.S. 634, 642-43 (1958) (NLRA).

fees. *Rogers*, 550 F.2d at 842; *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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STATUTORY APPENDIX

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Section 621 of the ADEA, 29 U.S.C. § 621 (1976), provides:

> (a) The Congress hereby finds and declares that—
>
> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.
>
> (b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Section 216(b) of the FLSA, 29 U.S.C. § 216(b) (1980 Supp. IV), provides:

> Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promo-

tion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the actions. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.